SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM

NANCY CORINNE DYER and J. RAYMOND DYER
Petitioners

PUBLIC SERVICE COMMISSION OF MISSOURI
and
UNION ELECTRIC COMPANY

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

J. RAYMOND DYER
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Attorney for Petitioners

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI and
UNION ELECTRIC COMPANY.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of Missouri.

Petitioners pray that a writ of certiorari issue to review the electricity rate increase judgment of the Supreme Court of Missouri entered December 12, 1960 in the above entitled cause sub nom. **State ex rel Nancy Corinne Dyer and J. Raymond Dyer, appellants, v Public Service Commission of Missouri, respondent, and Union Electric Company, intervener-respondent.**

CITATIONS TO OPINIONS BELOW.

The July 16, 1959 Report and Order of the Public Service Commission of Missouri ("PSC") is reported in **Matter of Union Electric Co., 29 PUR 3d 254**, and is set

forth in Appendix C-1. It was affirmed, without opinion, by the Circuit Court of Cole County, Missouri, on January 18, 1960. See Appendix C-3. That judgment was affirmed by the Missouri Supreme Court on December 12, 1960. That court's opinion is reported in **341 SW 2d 795** and is set forth in Appendix D-1.

JURISDICTION.

The judgment of the Missouri Supreme Court, the highest court in the State of Missouri, was final as to all parties and issues. Petitioners' motion for rehearing and to transfer to the court en banc was filed December 24, 1960, within time. That motion was overruled on January 9, 1961, on which date the court, on its own motion, modified its opinion. Jurisdiction is invoked under **28 USC 1257 (3)**.

WHEN AND HOW THE FEDERAL QUESTION WAS PRESENTED BELOW.

Appendix B specifies the stages in these proceedings, the manner in which, and the methods petitioner used to raise below the federal question presented for review herein. To summarize, the federal question was first presented by petitioners to the PSC at the outset of its adversary proceedings, in petitioners' Statement of Interest and Position, p. 2, filed March 2, 1958. Petitioners presented it thrice again, in their brief to the PSC, pgs. 4, 9 and 18, filed May 28, 1959, which brief is part of the record herein. They presented it again in their June 17, 1959 reply brief to the PSC, p. 3, which brief is part of the record herein. They presented it thrice again in their timely motion to the PSC for rehearing, pgs. 3 and 6, filed August 3, 1959. They presented it on October 30, 1959, in oral argument in the review proceedings before the Circuit Court of Cole County, Missouri. On April

23, 1960 they presented it in their motion to the Supreme Court of Missouri to hear this cause en banc, p. 3, and four times again to that court in their August 5, 1960 brief, pgs. 36, 38, 61 and 65. That brief is part of the record herein. At the September 26, 1960 oral argument before the Missouri Supreme Court petitioners presented the federal question again. In their timely December 24, 1960 motion to the Missouri Supreme Court for rehearing en banc petitioners presented the federal question thrice again, in their Points I, III and IV, p. 1. In their Suggestions in Support of that motion (which Suggestions are part of the record herein) petitioners presented the federal question four more times, on pgs. 4, 7, and 9. In all they presented it 22 times. Each time petitioners' contention that a federal question was involved was either ignored or tacitly overruled.

THE FEDERAL QUESTION.

The federal question presented here is whether the rate base of Union Electric Company ("Union"), a registered public utility holding company under the Public Utility Holding Company Act of 1935, can lawfully be determined by the PSC, for the purpose of fixing Union's Missouri electricity rates, on the basis of the federally repudiated "fair value" rule of **Smyth v. Ames (1898), 169 US 466, 546**, and **State ex rel Missouri Water Co. v PSC (Mo. 1957), 308 SW 2d 704, 719**, in view of the provisions of **Sec. 393.270(4), R.S.Mo. 1949, V.A.M.S.**, and the rejection of that "fair value" rule contained in Judge Learned Hand's District Court decision in **Consolidated Gas Co. v Newton (SD NY 1920) 267 F 231. PUR 1920 F 483, aff'd (1922) 258 US 165**, and in his law review article published in **24 Mich. L. R. 466, 473**, and in view of the substitution by this court of its "end result" rule, announced in **FPC v Hope Natural Gas Co. (1944) 320 US 591**, for that repudiated hodgepodge "fair value" rule.

STATUTES INVOLVED.

Sec. 1 (a) of the Public Utility Holding Company Act of 1935, **15 USC 79a, and Secs. 393.270(4) and 393.130(3), R.S.Mo. 1949, V.A.M.S.** They are set forth, in pertinent part, in Appendix A.

STATEMENT.

On September 26, 1958 Union filed with the PSC a Schedule of Rates under which it sought an increase in the prices it might charge its intrastate retail Missouri consumers for electricity as distinguished from its interstate wholesale Missouri consumers, the rates for whom are fixed by the Federal Power Commission under federal law. See PSC Tr. Vol. I, 35, Vol. III, 468, Vol. XI, 1366 and Union's Ex. B-25. In the proceedings that followed evidence of the original cost of Union's Missouri properties, and their reproduction (trended) cost as of the close of the test year, was introduced. The purpose was to ascertain the rate base.

Sec. 393.270(4), R.S.Mo. 1949, V.A.M.S. (Appendix A-2) required the PSC to take the "capital actually expended" by Union in acquiring its Missouri properties into consideration in determining the "price to be charged for . . . electricity". **State ex rel Missouri Water Co. v. PSC (Mo. 1957), 308 SW 2d 704,** which followed the federally repudiated "fair value" rule of **Smyth v Ames (1898), 169 US 466, 546,** required the PSC to take reproduction cost into consideration as well. One of the PSC commissioners inquired of petitioners, who were contending against application of the "fair value" rule:

> "Aren't we bound by what the (Missouri) Supreme Court, across the street, said . . .?" (PSC Tr. Vol. VIII, 1237).

The PSC felt itself so bound. It determined from the evidence that the adjusted depreciated original cost of Union's Missouri properties as of the end of the test year was $340,470,862, and that the adjusted depreciated reproduction (trended) cost of its Missouri properties as of the end of the test year was ~~$612,133,197~~ (Appendix C-1, p. 9). It considered both of those figures in its determination of the "fair value" of Union's Missouri properties, contrary to the federal rule as expressed by Judge Learned Hand in **Consolidated Gas Co. v Newton (SD NY 1920), 267 F 231, PUR 1920 F 483, aff'd (1922) 258 US 165,** and as expressed in his law review article, **24 Mich. L. R. 466, 473.**

The PSC's apportionment of "values" came about as follows: During the PSC proceedings one of the Commissioners asked Mr. John H. Bickley, one of Union's expert witnesses, what "fair value" was. Mr. Bickley replied (PSC Tr. Vol. VI, 963) that "fair value is a judgment figure". That Commissioner then said (PSC Tr. Vol. VI, 954):

> "Boiling it down simpler, isn't the question involved in all these rate cases: How much money does the company need? How many dollars does the company need?"

Mr. Bickley replied (Id.) that "It is necessary to have some sound approach to the problem. No one is in a position to say this company ought to have $20 million or $30 million unless he has a rational approach".

Then another Commissioner asked Mr. Bickley (Id., 961) if he had "arrived at any fixed principle that commissions could use in figuring out from original cost and reproduction cost what is the fair value?". Mr. Bickley replied (Id.):

> "I would give about 75% weight to original cost and 25% weight to reproduction cost".

That is what the PSC did. It took 75% of the adjusted depreciated original cost and added to that $255,353,146.50 figure 25% of the adjusted depreciated reproduction (trended) cost, which 25% was $154,087,522, and came up with its rounded "fair value" figure of $409,500,000 (Appendix C-1, p. 17). On that rate base the PSC granted Union a 5.25% annual return, which would yield it a net operating income of $21,504,957 per annum, which yield was what Union sought. The PSC cut the pattern to fit the cloth.

There were other apportionment estimates. Mr. Bickley twice offered an alternative 50%-50% split (PSC Tr. Vol. II, 349, 428). Union's president advocated a 65%-35% split (PSC Tr. Vol. III, 454). The PSC, though the record does not disclose on what grounds other than a desire to give Union a 5.25% annual return on whatever sum would yield it a net operating income of the $21,504,957 per annum revenue it sought, accepted Mr. Bickley's suggested 75%-25% split and entered its Report and Order accordingly (Appendix C-1).

The PSC granted a number of representative persons leave to intervene, including petitioners (PSC Tr. Vol. I, 7), who were (and are) common stockholders and residential consumers of Union who did not (and do not) use air conditioning. This case is not moot. The rate increase Union sought for residential consumers as a class, allegedly justified on the basis of the increased cost of service to them per kw hr occasioned by their extensive seasonal use of air conditioning, was greater, percentage-wise (3.1%), than the increase sought for industrial consumers (PSC Tr. Vol. III, 567; Vol. IV, 633). Indeed, Union's president testified that the proposed Schedule of Rates was designed to provide a "rate situation which will attract industrial development" (PSC Tr. Vol. I, 36).

An officer of Union testified that it had over 500,000 residential consumers (PSC Tr. Vol. I, 55) and that they represented 90 to 95% of all its consumers in Missouri (PSC Tr. Vol. IV, 595). He admitted that Union had not determined what percentage of residential electricity was used for lighting, cooking, heating, appliance operation, or air conditioning (PSC Tr. Vol. IV, 666). Nonetheless, he stated that 75 to 80% of Union's residential consumers used air conditioning (PSC Tr. Vol. IV, 634). However, that estimate was admittedly not based on any canvass. Petitioners contended that such estimate for the test year was excessive.

The PSC found (Appendix C-1, p. 17) that "with respect to the distribution of the proposed increase among the various classes of customers" there was no "undue or unreasonable preferences", and no "undue or unreasonable prejudice or disadvantage". **Sec. 393.130(3), R.S.Mo. 1949, V.A.M.S.** (Appendix A-3) prohibits discrimination. In that connection the PSC also found (Appendix C-1, p. 12) that "The rates the Company proposes to charge have shifted the burden in the proper direction", and that the rates for residential consumers would be increased "from 7% to as high as 12% or more when (the) proposed rates are compared to those now being charged".

The Circuit Court of Cole County, Missouri, perfunctorily affirmed the PSC Report and Order on the basis of the **Missouri Water Co.** case. The Missouri Supreme Court affirmed the Circuit Court's judgment for the same reason (Appendix D-1, p. 7; **341 SW 2d 799**), stating "We consider it to be a clear, logical and just decision and have no disposition to depart from it". The Missouri Supreme Court did not apply the "end result" rule of **FPC v Hope Natural Gas Co. (1944) 320 US 591.**

The Missouri Supreme Court considered only part of the "end result" of the rate increase. It found that petitioners' rate "was increased 8.6% while the rate for industrial consumers was increased only 5.5%", and that as a result petitioners' electricity bill "was increased approximately thirty cents per month" (Appendix D-1, p. 7; **341 SW 2d 799**). It took that "result" from appellants' brief, p. 19. See Mo. Sup. Ct. Tr. for appellants' August 5, 1960 brief, nine copies of which are submitted herewith. All briefs, whether submitted to the PSC or to the Missouri Supreme Court, are part of the record herein.

The Missouri Supreme Court took cognizance of none of the other "results". It failed to find that Union's president had publicly stated on May 6, 1960 that Union's "net operating revenues for 1959 resulted in a rate of return of 6.23% per annum on the then net original cost rate base", and that "1960 will show 6.5%" (Mo. Sup. Ct. Tr., appellants' brief, p. 12 and said brief's Appendix A). It failed to find that the market price of Union's common stock rose from 30¾ High, 30⅜ Low, on September 21, 1959, to 38⅞ by June 24, 1960 (Id., p. 13). It was urged to take judicial notice of that under **Mack v Mishkin (SD NY 1959) 172 F Supp 885, 886; In re Malcom (CC&PA 1942) 129 F 2d 529, 533; and Brown v Piper (1875) 91 US 37, 42.** It did not do so.

The Missouri Supreme Court also failed to find that Union's common stock dividends went up from 38¢ per quarter to 45¢ per quarter as a "result" of the rate increase (Mo. Sup. Ct. Tr., appellants' brief, pgs. 14-15), and that Union increased the annual salaries of its directors and officers from $460,944.52 in 1957 (PSC Tr. Vol. III, 555) to $514,375 in 1959 (Mo. Sup. Ct. Tr., appellants' brief, pgs. 10-11). The salary of Union's president was increased from $90,000 to $100,000, with retirement benefits of $36,146.85 per annum. The total annual salaries of Union's

officers and directors, as reported by Union to the Securities and Exchange Commission ("SEC") are $543,951,41: That is a matter of public record. The Missouri Supreme Court was urged to take judicial notice of those facts, but did not do so.

The Missouri Supreme Court also failed to consider, as a "result" under the **Hope** case rule, that, according to the U. S. Department of Labor's Consumer Price Index, the general cost of living in St. Louis rose only 2% from 1958 through the second quarter of 1960, while the cost of gas and electricity in St. Louis rose over 10% (Mo. Sup. Ct. Tr., appellants' brief, pgs. 16-18).

Another "result" of the rate order entered by the PSC that was ignored by the Missouri Supreme Court was that when, on September 10, 1959, after that rate order went into effect on August 5, 1959, Union issued stock subscription rights to its common stockholders, 1 for 10, authorizing them to subscribe to 1,436,602 shares of Union's common at $30 per share, eight of Union's officers and directors bought up rights on the New York Stock Exchange. Union's president bought 21,000, sold ~~1,320~~ of them, and exercised the remaining 9680. All the others exercised the rights they bought, and all made short-swing arbitrage profits in violation of **Sec. 17(b)** of the Public Utility Holding Company Act—**15 USC 79q(b)**. See Mo. Sup. Ct. Tr., appellants' brief, p. 14.

Since all of those eight officers and directors had to disclose their rights transactions to the SEC under **Sec. 17(a)** of that Act, each admitted them at the March 2-3, 1960 hearing in **Matter of Union Electric Co., SEC Docket No. 31-635** (Mo. Sup. Ct. Tr., appellants' brief pgs. 13-14). The Missouri Supreme Court did not take cognizance of that "result" of the PSC's rate order, though it was a matter of public record called to its attention by appellants below.

On December 9, 1958 petitioners herein were granted leave to intervene before the PSC, as previously stated. Union objected (PSC Tr. Vol. I, 7). To avoid the federal question it knew petitioners intended to raise Union thereafter, on January 12, 1959, amended its long fallow March 23, 1956 petition to the SEC to exempt it from the Public Utility Holding Company Act (Mo. Sup. Ct. Tr., appellants' brief, p. 65). On December 29, 1959, after the PSC proceedings herein had terminated, and while the Circuit Court proceedings herein were pending, the PSC, at the ex parte instance of Union and without invitation from the SEC to do so, recommended to the SEC that Union's petition for exemption be granted (Id., p. 66). If granted, the federal question presented here would be moot. That matter of Union's exemption from the Public Utility Holding Company Act is still pending before the SEC. The federal question here is not moot. Union is still a registered public utility holding company.

Though all matters of public record, and though all called to its attention by petitioners herein as shown by the record in this case, the Missouri Supreme Court did not take judicial notice of any of those "results" of the PSC's Report and Order herein. It took judicial notice of but one "result", i. e. that petitioners' rate went up 30¢ a month. It only partially applied the "result" rule of the **Hope** case. It recognized the rule but evaded it.

In its September 10, 1960 brief to the Missouri Supreme Court (Mo. Sup. Ct. Tr., intervener-respondent's brief, pgs. 6, 21) Union stated that petitioners' position as stockholders was inconsistent with their position as consumers, and that because their stockholder interest was greater than their consumer interest their purpose was one of "losing, rather than gaining, money". Hence Union sought dismissal of the appeal.

On p. 18 of its brief Union distinguished the **Consolidated Gas. Co.** case and the **Hope** case and said that, as regards the "rates involved in this case", the decisions of the "Federal Courts" were not "binding" on the PSC or the Missouri Supreme Court. The PSC subscribed to that view (Mo. Sup. Ct. Tr., PSC's letter filed September 13, 1960). The federal question was recognized by the parties, if not by the court below.

In its brief to the court below, p. 1, Union stated that appellants went "outside the record" in their brief. They did, but only insofar as to ask the court below under the rule of **Brown v Piper (1875) 91 US 37, 42**, to take judicial notice of facts pertinent to the "end result" and "impact" of the PSC's rate order which were generally known or ascertainable within the limits of its jurisdiction, and which had transpired after that rate order became effective. The court below did take judicial notice of the fact that appellants' electricity bill went up 30¢ a month (see Union's brief, p. 5), but failed to take judicial notice of the fact that the salary of Union's president went up $10,000 a year.

In this certiorari proceeding petitioners seek review of the judgment of the court below, not review of the PSC rate order. Under the **Hope** case it is the "end result", the "impact of the rate order", that counts. No court can judge the "end result", the "impact", of a Schedule of Rates until after they have gone into effect. Just as appellate courts take judicial notice of facts outside the record that cause mootness (**Smith v U. S. (1875) 94 US 97; Tennessee etc. R'd Co. v Southern Tel. Co. (1888) 125 US 695**), so also do they take judicial notice of pertinent cognizable events not transpiring until after the record of the court or administrative body below is closed. See **20 Am. Jur., "Evidence", Sec. 27, p. 55; 3 Am. Jur., "Appeal and Error", Sec. 834, p. 375**; and **Dakota County v Glidden (1885) 113 US 222. 226.**

That is what the court below should have done here if the "end result" rule of the **Hope** case means anything. No court can determine the reasonableness of the "end result" of a rate order unless it follows the result to the end, going as far as it can go under the judicial notice rule when asked to do so. None of the facts appellants asked the court below to judicially notice were denied. All were true.

REASONS FOR GRANTING THE WRIT.

1. The judgment of the court below is irreconcilable with **Sec. 1(a)** of the Public Utility Holding Company Act of 1935, under which statute petitioners claim their rights herein. If Union, as a registered public utility holding company, is "affected with a national public interest" the federal rate base rule, not the Missouri rate base rule, should have been applied. **Rule 19(a)** of this court is applicable. This is a substantial federal question, not heretofore determined by this court.

2. The judgment of the court below is irreconcilable with **Consolidated Gas Co. v Newton (SD NY 1920) 267 F 231, PUR 1920 F 483, aff'd (1922) 258 US 165,** and with the cogent reasoning Judge Learned Hand stated in the District Court opinion therein, and in his law review article in **24 Mich. L. R. 466, 473.** The "fair value" rule of **Smyth v. Ames (1898) 169 US 466, 546** was overruled by implication when this court affirmed Judge Hand's decision in the **Consolidated Gas Co.** case, and expressly so in **FPC v Hope Natural Gas Co. (1944) 320 US 591.** The court below applied it nonetheless.

Judge Hand, who Mr. Justice Frankfurter recently declared was "conceded to be the greatest master of English speech on the bench since Holmes laid down his pen" **(The Reporter, April 16, 1959, p. 4),** dealt the death blow

to the hodgepodge "fair value" rule of **Smyth v Ames** in his District Court decision in **Consolidated Gas Co.**, and buried it with ridicule in his aforesaid law review article. The court below raised it, like Lazarus, from the dead. It should be reinterred.

"Value is a word of many meanings". **Bonbright: "Valuation of Property", 1st Ed., 1937, Vol. II, 1166.** To determine a rate base by taking 75% of the original cost "value" and adding thereto 25% of the reproduction cost "value" (or 50% and 50%, or any other constitutive apportionment) is absurd. It is like asking an historian to determine the present day Gregorian calendar date of Montezuma's death by adding some of the Aztec calendar death date to some of the Julian calendar death date and come up with a "fair and reasonable" Gregorian calendar death date. It is like trying to add some of a 1910 automobile to some of a 1961 automobile to make up a 1955 car.

As Judge Hand said, it constitutes "an abandonment of any attempt to deal intelligibly with the question to say that cost of reproduction **and** the original cost are each elements to be considered". **Consolidated Gas, D.C. l.c. 236, PUR l.c. 491.** To consider both is to apply "the comforting doctrine that all principles, however conflicting, shall have just recognition". **24 Mich. L. R. 473.** That constitutes "the tolerance of contradictories" **(Id.)**.

That should be clear to this court, though it was not to the court below. By holding that the "fair value" of Union's properties lay "somewhere between these two brackets" the court below illustrated what **Maitland** meant when he said in his **Collected Essays**: "To make a mess and call it law". **Stephen Leacock** had the same thing in mind when he had his Lord Ronald fling himself upon his horse and "ride madly off in all directions".

3. The decision of the court below presents the problem left undecided in **FPC v Hope Natural Gas Co. (1944) 320 US 591, 617,** respecting discriminations between residential consumers and industrial consumers. **Rule 19(a)** of this court is applicable.

4. There are 17 public utility holding companies in the United States, and they supply most of the electricity supplied. The rate base rule applied in their intrastate retail operation should conform to that applied by the FPC to their interstate wholesale operations, i.e. Mr. Justice Brandeis' "prudent investment" rule. **Southwestern Bell Telephone Co. v PSC of Mo. (1923) 262 US 276, 289.** The court below should have followed that rule. It could not follow the reproduction cost rule because of **Sec. 393.270(4), R.S.Mo. 1949, V.A.M.S.**

5. Large sums, and a vast number of people, are involved here. Union has over 500,000 residential consumers. Excessive rates amounting to $3,630,236.75 per annum are involved. The issue is one of continuing importance, and is not confined to Missouri alone. It is in the national public interest that it be resolved by this court.

6. The "end result" of the **Hope** case was only partially applied by the court below, whose decision in that respect is unjust, unreasonable and plainly wrong. The court below so far departed from the accepted and usual course of State court judicial proceedings where a substantial federal question is involved as to call for the exercise of this court's power of correction.

In **Halsted v SEC (CA DC 1950) 182 F 2d 660, 662,** the court declared that when Congress enacted the Public Utility Holding Company Act of 1935 it "showed that it deemed the public utility holding company field to be one requiring a stricter measure of regulation and control than was the case of corporations generally", since the

"employment of legal expertise in sleight-of-hand was not unknown in the utility holding company field". The court below did not enforce that mandate. Contrary to the above quoted statements of the court in the **Halsted** case the court below tacitly approved all the "results" attendant the issuance of the PSC's rate order herein, excepting the one respecting petitioners, which it expressly approved, and likewise tacitly approved Union's "adroit manipulations" whereunder it was allowed to put into effect discriminatory rate increases that were greatly in excess of its needs.

7. As stockholders, petitioners believe they have a responsibility that goes beyond monetary gain. They opposed the application of the "fair value" rule by the PSC, the Circuit Court, and the court below, even though, from an economic standpoint solely, the application of that rule would be advantageous to their corporation. They opposed it because they believed it outside the law. "The law cannot hold that corporate interests are better served by action outside rather than within the law". **Abrams v Textile Realty Corp. (1949) 97 NYS 2d 492, 496.**

In **In re Engineers Public Service Co. (CA 3, 1955) 221 F 2d 708, 713,** the court held that when Congress enacted the Public Utility Holding Company Act of 1935 it intended that adversary proceedings under that Act should be encouraged, both by the courts and by the regulatory commissions. This is a Holding Company Act proceeding but the court below did not follow that Congressional mandate. It discouraged petitioners, with ridicule and abuse. It cited and followed **Dyer v SEC (CA 8, 1959) 266 F 2d 33, cert. den. 361 US 835, rehearing den. 361 US 911,** which likewise discouraged petitioners with ridicule and abuse. It did not follow **Dyer v SEC (1959) 361 US 803,** which followed the **Engineers** case and encouraged petitioners by awarding them half their certiorari costs.

There are some 12,000,000 stockholders in listed corporations in this country. If the morality of all the corporations in which those stockholders own stock is to be left entirely to their managements, and the attempted exercise of stockholder responsibility by stockholders themselves is to be sneered at and all but throttled judicially, as here, we may expect more and more shocking scandals like those involving General Electric and Westinghouse, recently the subject of severe rebuke by Judge J. Cullen Ganey.

If shareholder capitalism is to survive on a broad base in this country shareholder responsibility must be judicially encouraged, particularly in Public Utility Holding Company Act proceedings. The decision of the court below, which on this encouragement point relies on the decision of the Eighth Circuit in **Dyer v SEC, 266 F 2d 33**, is in conflict with the decision of the Third Circuit in **In re Engineers Public Service Co., 221 F 2d 708.** The writ should be granted here on policy settlement grounds.

CONCLUSION.

For the foregoing seven reasons this petition should be granted.

Respectfully submitted,

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NO. 886.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI
and UNION ELECTRIC COMPANY,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri.

BRIEF

For Respondent Union Electric Company
in Opposition.

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Sec. 393.150 (20 V. A. M. S., § 393.150) 3, 5
Sec. 393.230 (20 V. A. M. S., § 393.230) 3, 5
Sec. 393.270 (20 V. A. M. S., § 393.270) 3, 5

Rules:

U. S. Supreme Court Rule 23, para. 1 (c) 13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

NO. 866.

NANCY CORINNE DYER and J. RAYMOND DYER,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF MISSOURI
and UNION ELECTRIC COMPANY,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Missouri.

BRIEF

For Respondent Union Electric Company in Opposition.

OPINIONS BELOW.

The Opinion of the Supreme Court of Missouri, captioned *State ex rel. Dyer v. Public Service Commission of Missouri et al.* (Pet. App. D-1), is reported in 341 S. W. 2d 795. The Findings, Conclusions and Order of the Public Service Commission of Missouri, captioned *Re Union Electric Company* (Pet. App. C-1), are reported in 29 PUR 3d 254.

JURISDICTION.

The judgment of the Supreme Court of Missouri, the highest court of that state (Mo. Const., Art. V, § 2—R. S. Mo. 1949 at p. 62), was entered December 12, 1960, as shown by the minute entry set out in Petitioners' Appendix D-2. The timely motion of Petitioners (Appellants in that court) for a rehearing (Pet. App. D-3) was denied on January 9, 1961, as shown by the minute entry set out in Petitioners' Appendix D-4. The petition for a writ of certiorari was filed in this Court on April 1, 1961.

The jurisdiction of this Court is invoked by Petitioners (Pet. p. 2) under *28 U. S. C. § 1257 (3)*, which is as follows:

> "**§ 1257. State courts; appeal; certiorari.**
>
> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . . . .
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929."

QUESTION PRESENTED.

Petitioners' statement of the question presented appears at page 3 of their petition. Eliminating surplusage in that statement, and having regard to the facts shown by the record, the question actually presented, as we see it, is substantially as follows:

In passing upon the price-rates of Union Electric Company, a public utility corporation of Missouri (which is also a "Holding Company" under the Public Utility Holding Company Act of 1935—15 U. S. C. § 79), for electric service in that state, did the tribunals below err in considering, as required by the Missouri rule, the reproduction cost less accrued depreciation, as well as the original cost less depreciation, of the properties devoted to the services in question?

No federal question, we think, is involved in the case.

STATUTES INVOLVED.

The following Missouri statutes (pertinent parts of which are set out in the Appendix to this brief) were applied by the court below in reaching its decision:

R. S. Mo. 1949, § 393.150 (20 V. A. M. S., § 393.150);[1]
R. S. Mo. 1949, § 393.230 (20 V. A. M. S., § 393.230);
R. S. Mo. 1949, § 393.270 (20 V. A. M. S., § 393.270);
R. S. Mo. 1949, § 386.500 (20 V. A. M. S., § 386.500).

The petition for certiorari refers to one federal statute as being involved in this proceeding. That is Section 1 (a) of the Public Utility Holding Company Act of 1935 [15 U. S. C., § 79a (a)], which declares that "public-utility holding companies and their subsidiary companies are affected with a national public interest" in enumerated particulars. That section also is set out in the Appendix to this brief—with Section 21 of the same Act (15 U. S. C., § 79u), which provides, inter alia, that the Act shall not affect the non-conflicting jurisdiction of any State, and pertinent parts of Section 2 (15 U. S. C., § 79b), defining terms used in the Act.

[1] Each of the sections of the official edition of the Missouri Statutes (Revised Statutes, Missouri 1949) appears under the same section number in *Vernon's Annotated Missouri Statutes* (V. A. M. S.). The latter publication is the one referred to in the opinion below (341 S. W. 2d 795).

STATEMENT.

Union Electric Company (Union), a Missouri corporation and a "public utility" within the meaning of the Missouri Public Service Commission Act, filed with the Public Service Commission of that state (the Commission) a schedule of new rates for electric service rendered by it in the State of Missouri (Commission Report and Order, 29 PUR 3d 256-257; Pet. App. pp. 9-10).

The Commission, after ordering that the proposed rates be suspended pending the outcome of a hearing, conducted such a hearing, at which evidence was presented by the interested parties and by the Commission's staff, and afterwards issued its "Report and Order", dated July 16, 1959, in which it stated its findings and conclusions and directed that the new schedule of rates "be permitted to become effective on August 5, 1959" (29 PUR 3d 254-267, Pet. App. C-1).

J. Raymond Dyer and his daughter Nancy Corinne Dyer (Petitioners here), stockholders of Union—the former also a residential customer of Union—who had been permitted to intervene in the hearing before the Commission, filed with the Commission a motion for rehearing, which was denied, obtained a judicial review by the Circuit Court of Cole County, Missouri, which rendered judgment affirming the Commission's order, and appealed from that judgment to the Supreme Court of Missouri which, after reviewing the Findings, Conclusions and Order of the Commission, affirmed the judgment of the lower court (**State ex rel. Dyer v. Public Service Commission et al.**, 341 S. W. 2d 795, Pet. App., pp. 28-40).

**The Commission's Action—
Statutory Basis.**

The principal Missouri statutes under which the Commission acted, all of which are referred to in the subsequent decision of the court (341 S. W. 2d 795), are set out, in pertinent part, in the Appendix to this brief. It will suffice to indicate here the effect of the more important provisions of them:

R. S. Mo. 1949, § 393.150 (20 V. A. M. S., § 393.150), empowers the Commission to pass upon proposed rates for service by public utility corporations, to suspend proposed rate schedules and to make appropriate orders with respect to them.

R. S. Mo. 1949, 393.230 (20 V. A. M. S., § 393.230), empowers the Commission to ascertain "the value of the property" of every public utility corporation supplying electric service and "every fact which in its judgment may or does have any bearing on such value," to hold hearings for that purpose and to make findings, subject to judicial review.

R. S. Mo. 1949, § 393.270 (20 V. A. M. S., § 393.270), in conjunction with § 393.150, empowers the Commission to fix the maximum price to be charged by a public utility corporation for electric service and for that purpose to consider "all facts which in its judgment have any bearing upon a proper determination of the question . . . with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

Before this case was presented to the Commission, the statutes to which we have referred had been construed by the Supreme Court of Missouri in a number of decisions. Under those decisions the Commission, in de-

termining permissible rates for public utility service, was required to determine the "fair value" of the properties devoted to the public utility service in question and to consider for that purpose not only net original cost (cost less depreciation) but also reproduction cost less depreciation or "net trended cost" of those properties, as well as other pertinent factors (**State ex rel. Missouri Water Company v. Public Service Commission et al., 308 S. W. 2d 704** and cases therein cited).

But the Missouri rule does not prescribe any formula to be followed by the Commission or preclude fair exercise of its discretion in weighing the relevant factors for the purpose of determining whether or not the proposed rates are reasonable, as pointedly stated in the case we have just cited (308 S. W. 2d at p. 718—[7]).

The Commission's Findings.

The Commission found that the net original cost of Union's property devoted to service in Missouri was $335,461,153, and that the net trended cost of the property was $612,133,137. (29 PUR 3d at p. 262—Pet. App. at p. 16).

With the addition of items covering materials and supplies, prepayments, and contributions for extensions, those figures became $340,470,862 and $616,349,088 (29 PUR 3d at p. 262—Pet. App. at p. 16).

Neither of those amounts included any allowance for cash working capital. The Commission found it unnecessary "in this particular proceeding to find the exact amount of cash working capital which could properly have been included in the rate base". (29 PUR 3d at p. 267—Pet. App. at p. 23).

It found that net operating revenues under the proposed new rates would be $21,504,957, providing a rate of re-

turn of 6.32% upon net original cost and of 3.49% upon net trended cost (29 PUR 3d at p. 262—Pet. App. at p. 16).

The final conclusion of the Commission, as expressed at the end of its Report and Order, was this:

> "The commission finds the fair value of the company's electric properties used in Missouri as of June 30, 1958, to be $469,500,000, upon which value net operating income of $21,504,957 would yield a rate of return of 5.25 per cent per annum which the commission deems to be reasonable."[2]
>
> (29 PUR 3d at p. 267—Pet. App. at p. 24.)

Court Opinion.

The principal contention of Appellants (Petitioners here) in the Supreme Court of Missouri, as appraised by the court, was that relating to the "proper method of fixing a base for utility rates". The court rejected that and all other contentions made, re-affirmed the rules followed in its previous decisions, especially in **State ex rel. Missouri Water Company v. Public Service Commission** (308 S. W. 2d 704), and found that there was nothing in the record of this case to indicate that the decision of the Commission was unlawful, unreasonable, arbitrary or in any respect beyond the boundaries of the discretion vested in the Commission by the Missouri statutes. It therefore affirmed the judgment of the lower court which had first reviewed the Commission's action (341 S. W. 2d 795-802—Pet. App., 28-40).

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[2] The statement in the petition for certiorari (at p. 6) to the effect that the Commission arrived at its finding of fair value by taking 75% of "adjusted depreciated original cost" and adding 25% of "adjusted depreciated reproduction (trended) cost" is not supported by any statement in the Commission's Report and Order or by any statement in the court opinion.

Alleged Federal Question—The Record.

The Petitioners did not, at any stage in the proceedings below, assert that any of the Missouri statutes, followed by the Commission and applied by the court, deprived them or either of them of property without due process of law in violation of the Fourteenth Amendment or that, by any of those statutes, Petitioners or either of them were denied the equal protection of the laws in violation of that amendment. Nor did they assert that the court's construction of any of those statutes had such an effect. They presented no constitutional question.

> In what we have just said, we are not overlooking assertions (quoted at page 6 of Petitioners' Appendix here) that "Due process as guaranteed by the XIV Amendment of the Constitution of the United States was violated". None of those assertions included any claim that a constitutional right of Petitioners was violated either by deprivation of property or by denial of the equal protection of the laws.

Petitioners' assertion here that a federal question was raised by them below is based upon the contentions they made to the effect that the Missouri rule as to valuation of public utility property was inconsistent with pronouncements in certain federal decisions, notably in **Federal Power Commission v. Hope Natural Gas Company, 320 U. S. 591,** which they asserted to be applicable because Union was a "holding company" under the Public Utility Holding Company Act of 1935 and as such "affected with a national public interest" (see Petitioners' Appendix at pp. 2-6).

ARGUMENT.

It is sufficiently apparent, we think, from the petition itself that no substantial federal question is presented here and, indeed, that the case is not within the purview of the statute defining the jurisdiction of this Court (28 U. S. C. § 1257), the pertinent part of which is set out under the heading "Jurisdiction" of this brief.

However, we have recounted in the preceding statement what we regard as the decisive factors shown by the record—for such assistance as that may afford. For the same reason we add the following comments, although we do not regard them as at all necessary.

I.

As to the Asserted Effect of the Federal Holding Company Act.

What Petitioners present as a "federal question" (Petition, p. 3) is elucidated in the first paragraph of their "Reasons for Granting the Writ" (Petition, p. 12), as follows:

> "1. The judgment of the court below is irreconcilable with **Sec. 1 (a)** of the Public Utility Holding Company Act of 1935; under which statute petitioners claim their rights herein. If Union, as a registered public utility holding company, is 'affected with a national public interest' the federal rate base rule, not the Missouri rate base rule, should have been applied. **Rule 19 (a)** of this court is applicable. This is a substantial federal question, not heretofore determined by this court."
>
> (Petition, p. 12.)

In fact, neither Section 1 (a) nor any other section of that statute has the slightest bearing upon this case in any respect.

Section 1 (a) of the Act does declare that holding companies are affected with a national public interest in respect of certain enumerated factors: (1) distribution of their securities by mail and instrumentalities of interstate commerce, (2) use of the mails and of interstate facilities in performance of their contracts, (3) interstate sale and transportation, by their subsidiaries, of gas and electric energy, (4) practices, in exercising control over subsidiary companies, which affect the interstate commerce in which those companies engage, and (5) activities extending over many States which are not susceptible of effective State control or regulation (15 U. S. C., § 79a). The full text of Section 1 (a) is set out in the Appendix to this brief.

The regulatory provisions in the remaining sections of the Act relate to subjects indicated by the factors enumerated in Section 1 (a). There is no provision in the Act regulating rates or prices for electric service. The Act does not touch that field.

Petitioners' claim that the Act limits the jurisdiction of Missouri over rates for service in that state is without basis in any provision of the Act. Moreover, Section 2[1] of the Act (15 U. S. C., § 79u—see full text in Appendix hereto) contains a specific disclaimer of legislative intent to affect non-conflicting state jurisdiction—even as to subjects, such as securities and contracts, which in some aspects are within the purview of provisions of the Act. Regulation of rates for electric service, we repeat, is a subject beyond the purview of any provision of the Act.

In short, the theory upon which Petitioners base their claim that this case involves a federal question is fanciful

II.

As to the Asserted Effect of Certain Federal Decisions Involving Rate Regulation.

Proceeding from their basic premise that the Holding Company Act required the court below to apply what they call the "federal rate base rule" (Petition, p. 12), Petitioners next contend, in effect, that that rule is essentially inconsistent with the Missouri rule, which the court did apply (Petition, p. 12). The principal decision on which they rely is the decision of this Court in **Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 64 S. Ct. 281.**

Since the premise is untenable, the contention based upon it is immaterial here. However, it seems to us to be worth noting that there is no such essential inconsistency as Petitioners assert.

In the Hope Natural Gas case this Court reviewed an order of the Federal Power Commission under the Natural Gas Act of 1938 (15 U. S. C., § 717 et seq.). The majority opinion in the case is directed principally to interpretation of the Act under which the Commission made the order. In the course of that opinion there is considerable discussion of elements affecting the determination of proper rates. But the test applied related to the effect of the rate order rather than to the method followed in determining it. In the language of the majority opinion:

> "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Com-

mission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences."

(Federal Power Commission v. Hope Natural Gas Co., 320 U. S. at p. 602, 64 S. Ct. at p. 288.)

Applying the stated test, the majority opinion observed:

"The conditions under which more or less might be allowed are not important here. Nor is it important to this case to determine the various permissible ways in which any rate base on which the return is computed might be arrived at. For we are of the view that the end result in this case cannot be condemned under the Act as unjust and unreasonable from the investor or company viewpoint."

(320 U. S. at p. 603, 64 S. Ct. at p. 288.)

The Missouri rule requires **consideration** by the regulatory agency of all relevant elements. But it does not prescribe any formula as to the weight to be attributed to the various elements considered. As stated in the leading Missouri case, which was followed by the court below in the instant case,

"[7] Thus it is that the courts do not and should not circumscribe regulatory agencies by any hard or fast formula. Each case must be determined upon its own facts and, oftentimes, varying factors that may be peculiarly relevant to a reasoned determination of the issue of 'just and reasonable' rates under conditions then existing. It follows as a matter of course that neither the rate base nor the return to the

company is to be fixed by 'rule of thumb' or in the interest of expediency."

(State ex rel. Missouri Water Co. v. Public Service Commission, 308 S. W. 2d 704—above-quoted statement at p. 718.)

In that case the Missouri court considered the majority opinion of this Court in the Hope Natural Gas case and concluded that it was not essentially inconsistent with the Missouri rule (308 S. W. 2d at pp. 714-716). Its conclusion to that effect seems to us to be sound. But that is not of importance here—in view of the fact that this case is governed by Missouri law.

III.

As to Certain of Petitioners' Extraneous Contentions.

Petitioners—at page 14 of their petition, in a paragraph numbered 3—refer to "discriminations between residential consumers and industrial consumers" as being involved in this case. However, their statement of the question presented (at page 3 of their petition) does not refer to any such factor. For that reason we assume that the statement at page 14 of the petition is to be disregarded under Rule 23, paragraph 1 (c), of this Court. Moreover, as pointed out in the statement of this brief, Petitioners did not assert in the court below that the order of the Commission or the decision of the court denied them the equal protection of the laws or otherwise violated any of their constitutional rights. The assertion made at page 14 (paragraph 3) of their petition, therefore, adds nothing to the factors to be considered.

The petition includes a number of other statements and contentions which we regard as so obviously immaterial that it is unnecessary to discuss them.

CONCLUSION.

In the decision of the court below the case was properly treated as determinable by the law of the State of Missouri. The petition for certiorari presents no substantial federal question. The review sought is not within the purview of the statute under which the jurisdiction of this Court is invoked (28 U. S. C., § 1257). For these reasons, we submit, the petition for a writ of certiorari to the Supreme Court of Missouri should be denied.

Respectfully submitted,

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APPENDIX.

Missouri Statutes.

Pertinent parts of the Missouri statutes referred to in the opinion of the court below, and in this brief, are as follows:

R. S. Mo. 1949, § 393.150 (20 V. A. M. S., § 393.150). Commission may fix rates after hearing—stay increase—burden of proof.

"1. Whenever there shall be filed with the commission by any gas corporation, electrical corporation or water corporation any schedule stating a new rate or charge, or any new form of contract or agreement, or any new rule, regulation or practice relating to any rate, charge or service or to any general privilege or facility, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, . . . but upon reasonable notice, to enter upon a hearing concerning the propriety of such rate, charge, form of contract or agreement, rule, regulation or practice, and pending such hearing and the decision thereon, the commission . . . may suspend the operation of such schedule and defer the use of such rate, . . . ; and after full hearing . . . the commission may make such order . . . as would be proper in a proceeding initiated after the rate, charge, form of contract or agreement, rule, regulation or practice had become effective."

R. S. Mo. 1949, § 393.230 (20 V. A. M. S., § 393.230). Power of commission to ascertain valuation of property of gas, electrical and water corporations.

"1. The commission shall have the power to ascertain the value of the property of every gas corporation, elec-

trical corporation and water corporation in this state and every fact which in its judgment may or does have any bearing on such value. . . .

"2. For the purpose of ascertaining the matters and things specified in this section, concerning the value of the property of gas corporations, electrical corporations and water corporations, the commission may cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. . . . The commission shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced before it which in its judgment have bearing on the value of the property of the gas corporation, electrical corporation or water corporation affected.

"3. Such findings shall be subject to review by any circuit court of this state in the same manner and within the same time as other orders and decisions of the commission. . . ."

. . . . . .

R. S. Mo. 1949, § 393.270 (20 V. A. M. S., § 393.270). Notice and hearing—order fixing price of gas, water or electricity, or requiring improvement.

. . . . . .

"2. After a hearing and after such investigation as shall have been made by the commission or its officers, agents, examiners or inspectors, the commission within lawful limits may, by order, fix the maximum price of gas, electricity or water, not exceeding that fixed by statute to be charged by such corporation or person, for the service to be furnished; . . .

. . . . . .

"4. In determining the price to be charged for gas, electricity or water the commission may consider all facts which in its judgment have any bearing upon a proper de-

termination of the question, although not set forth in the complaint and not within the allegations contained therein, with due regard, among other things, to a reasonable average return upon capital actually expended and to the necessity of making reservations out of income for surplus and contingencies."

R. S. Mo. 1949, § 386.500 (20 V. A. M. S., § 386.500). Rehearing before commission.

"1. After an order or decision has been made by the commission any corporation or person or public utility interested therein shall have the right to apply for a rehearing in respect to any matter determined therein, and the commission shall grant and hold such rehearing, if in its judgment sufficient reason therefor be made to appear; . . .

"2. . . . Such application shall set forth specifically the ground or grounds on which the applicant considers said order or decision to be unlawful, unjust or unreasonable. No corporation or person or public utility shall in any court urge or rely on any ground not so set forth in said application."

Federal Statutes.

Section 1 (a) of the Public Utility Holding Company Act of 1935 [15 U. S. C., § 79a (a)], which is relied upon in the petition for certiorari, Section 21 of the same Act (15 U. S. C., § 79u) and pertinent parts of Section 2 thereof (15 U. S. C., § 79b) are as follows:

15 U. S. C., § 79a. Necessity for control of holding companies.

"(a) Public-utility holding companies and their subsidiary companies are affected with a national public interest in that, among other things, (1) their securities are widely marketed and distributed by means of the mails and

instrumentalities of interstate commerce and are sold to a large number of investors in different States; (2) their service, sales, construction, and other contracts and arrangements are often made and performed by means of the mails and instrumentalities of interstate commerce; (3) their subsidiary public-utility companies often sell and transport gas and electric energy by the use of means and instrumentalities of interstate commerce; (4) their practices in respect of and control over subsidiary companies often materially affect the interstate commerce in which those companies engage; (5) their activities extending over many States are not susceptible of effective control by any State and make difficult, if not impossible, effective State regulation of public-utility companies."

15 U. S. C., § 79u. Effect on other laws.

"Nothing in this chapter shall affect (1) the jurisdiction of the Commission under sections 77a-77mm or sections 78a-78jj of this title over any person, security, or contract, or (2) the rights, obligations, duties, or liabilities of any person under such sections; nor shall anything in this chapter affect the jurisdiction of any other commission, board, agency, or officer of the United States or of any State or political subdivision of any State, over any person, security, or contract, insofar as such jurisdiction does not conflict with any provision of this chapter or any rule, regulation, or order thereunder. Aug. 26, 1935, c. 687, Title I, § 21, 49 Stat. 834."

15 U. S. C., § 79b. Definitions; application of chapter Definitions.

"(a) When used in this chapter, unless the context otherwise requires—

"(1) 'Person' means an individual or company.

"(2) 'Company' means a corporation, a partnership, an association, a joint-stock company, a business trust, or

an organized group of persons, whether incorporated or not; . . .

. . . . . .

"(5) 'Public-utility company' means an electric utility company or a gas utility company.

. . . . . .

"(7) 'Holding company' means—

"(A) any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company by virtue of this clause or clause (B) of this paragraph, unless the Commission, as hereinafter provided, by order declares such company not to be a holding company; and

"(B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public-utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this chapter upon holding companies."